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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057366
Party	Defendant UVCleaning Systems, Inc.
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Attachments	MOTION TO LIFT SUSPENSION AND FOR SUMMARY JUDG- MENT.pdf(1964040 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

1047406 Ontario Ltd. and)	
Purifics ES, INC.,)	
)	MOTION TO LIFT SUSPENSION AND
Petitioners,)	FOR SUMMARY JUDGMENT
)	
v.)	
UVCleaning Systems, Inc., dba Puralytics)	Cancellation No.: 92057366
Corporation,)	
)	
Registrant.)	

**MOTION TO LIFT SUSPENSION AND FOR SUMMARY JUDGMENT OF NO
LIKELIHOOD OF CONFUSION**

Summary judgment is an appropriate method of disposing of this case because the Board has already decided after trial testimony and an oral hearing that:

1. Puralytic's water purification units (the genus of goods at issue in this case) are legally identical to Purifics' water purification units; and
2. Puralytic's mark PURALYTICS is not likely to give rise to confusion, mistake or deception as to the source of Puralytic's goods. (Hayes Decl.; Exh. A, pp. 12-14, 20).

These are undisputed facts as the Board's decision has not been appealed within the appeal period.

If one of a mark on a whole genus of goods is not likely to cause confusion – use of the mark on a species or good within the genus cannot be likely to cause confusion. Since PURALYTICS for water purification units (the genus of Puralytics' goods at issue in this Cancellation) is not likely to cause confusion with PURIFICS for water purification goods, no genuine dispute of fact can exist that PURALYTICS for portable sunlight activated *water purification units* (the species of Puralytics' goods at issue in this Cancellation) is likely to cause confusion with PURIFICS for water purification goods.

Where no genuine dispute of material fact exists, as here, the case is subject to summary judgment. FRCP 56(a). Thus, the Board should lift the suspension in this case and enter summary judgment of no likelihood of confusion. (The Board's Order of October 9, 2013, suspended this Cancellation "pending final disposition of [Opposition 91194706] between the parties.").

In more detail, the Board decided in Opposition 91194706 that Petitioners' alleged PURIFICS mark for water purification goods is not likely to cause confusion with Registrant's use of the challenged mark on "...[w]ater purification units" (the genus of good at issue in this Cancellation) because "the dissimilarity of the marks ... is dispositive." (Board's Decision in Opposition 91194706 concerning Application 77861438, pp. 12-14, 20 (April 14, 2014) (Exh. A)). More particularly, the Board found in Opposition 91194706 that "[w]hile applicant's goods are legally identical to opposers', we find that applicant's mark [PURALYTICS] is not likely to give rise to confusion, mistake or deception as to the source of applicant's goods" because "the dissimilarity of the marks ... is dispositive." (Exh. A, p. 20). **It is axiomatic that finding PURALYTICS for water purification units for "legally identical goods" not likely to cause confusion with Petitioner's alleged PURIFICS mark means that PURALYTICS for "[p]ortable sunlight activated water purification units" is not likely to cause confusion.** (Exh. A, p. 20); (Registration No. 4127809) (emphasis added).

The Interlocutory Attorney at the early stage of this proceeding carefully avoided confirming that this Cancellation would be moot if Registrant won the Opposition. The Interlocutory Attorney stated in granting Registrant's Motion to Stay that "identical mark[s]" are involved, the "goods ... are arguably related," and the Opposition "may have a bearing on the issues presented in this proceeding," but that he was at that time "disinclined" to confirm that

these proceedings would be mooted by Registrant's victory in the Opposition. (10/9/13 Order, p. 3).

The Interlocutory Attorney's initial reluctance to confirm that a decision in the related Opposition would dictate the outcome of this Cancellation is understandable. However, in the Opposition Petitioners argued not only on the basis of their registration for water purification *services*, but also on the basis of their alleged common law use of PURIFICS for water purification *goods*. The Board then found "the parties' goods to be legally identical, as it is clear that [Purifics] goods, *as shown by the evidence*, are encompassed within the scope of [Puralytics' goods:] 'Water purification and filtration apparatus; Water purification units.'" (Exh. A, p.12) (emphasis added). With this information that was not previously considered by the Interlocutory Attorney in this Cancellation, the Board found: "[Puralytic's] mark [PURALYTICS] is not likely to give rise to confusion, mistake or deception as to the source of [Puralytic's] goods" because "the dissimilarity of the marks ... is dispositive." (Exh. A, pp. 20).

As it has now been decided that PURALYTICS for water purification units (the genus of Puralytics' goods at issue in this Cancellation) is not likely to cause confusion with PURIFICS for water purification goods, no genuine dispute of fact can exist that PURALYTICS for portable sunlight activated *water purification units* (the species of Puralytics' goods at issue in this Cancellation) is likely to cause confusion with PURIFICS for water purification goods.

Summary judgment in favor of Puralytics is respectfully requested.¹

¹ As an alternative ground, the Board could find that *res judicata* now precludes Petitioners' Cancellation that seeks to cancel a mark for a species of goods within a genus upon which Registrant already prevailed and for which the Board already found that confusion is unlikely. To allow Petitioners to avoid *res judicata* under these circumstances would create an intolerable burden on Registrant of having to defend a never-ending series of proceedings against it whenever it files an application for its trademark for a species of water purification goods. Granting summary judgment and refusing Petitioner's Cancellation, on the other hand, would comply with the principle behind *res judicata* – that the dispute has been decided and is finally

Dated: June 27, 2014

Respectfully submitted,

UVCLEANING SYSTEMS, INC. dba
PURALYTICS CORPORATION

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concluded. While everyone is entitled to their day in court, Petitioner's had that day in Opposition 91194706 and they are not entitled to continue re-litigating the same issues.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 27, 2014, the foregoing MOTION TO LIFT SUSPENSION AND FOR SUMMARY JUDGMENT, was served on Petitioners' attorneys by first class mail, to:

Lisa H. Meyerhoff Myall S. Hawkins Tan Pham William R. Hales Baker & McKenzie LLP 700 Louisiana, Suite 3000 Houston, Texas 77002
--



Kevin M. Hayes

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

1047406 Ontario Ltd. and)	
Purifics ES, INC.,)	
)	DECLARATION OF KEVIN M. HAYES
Petitioners,)	
)	
v.)	Cancellation No.: 92057366
)	
UVCleaning Systems, Inc., dba Puralytics)	
Corporation,)	
)	
Registrant.)	

DECLARATION OF KEVIN M. HAYES

I, Kevin M. Hayes, declare and state as follows:

1. I am over 18 and an attorney with the firm of Klarquist Sparkman, which represents, Registrant, Puralytics Corporation, in this matter.
2. Attached Exhibit A is a true and correct copy of the Board's Order in Opposition 91194706 that Petitioners' alleged PURIFICS mark is not likely to cause confusion with Registrant's use of the challenged mark on "...[w]ater purification units" because "the dissimilarity of the marks ... is dispositive." (Board's Decision in Opposition 91194706 concerning Application 77861438, pp. 12-14, 20 (April 14, 2014)).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2014



Kevin M. Hayes

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 27, 2014, the foregoing DECLARATION OF KEVIN M. HAYES, was served on Petitioners' attorneys by first class mail, to:

Lisa H. Meyerhoff
Myall S. Hawkins
Tan Pham
William R. Hales
Baker & McKenzie LLP
700 Louisiana, Suite 3000
Houston, Texas 77002


Kevin M. Hayes

EXHIBIT

A

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing:
March 5, 2014

Mailed:
April 14, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

1047406 Ontario Ltd.

and

Purifics ES, Inc.

v.

UVCleaning Systems, Inc. d/b/a Puralytics Corporation

Opposition No. 91194706

Myall S. Hawkins and Lisa H. Meyerhoff of Baker & McKenzie LLP for 1047406 Ontario Ltd. and Purifics ES, Inc.

Salumeh R. Loesch and David P. Petersen of Klarquist Sparkman, LLP for UVCleaning Systems, Inc.

Before Wellington, Adlin and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

UVCleaning Systems, Inc. ("applicant") filed an application to register the mark PURALYTICS in standard character form for "Waste water purification units;

Water purification and filtration apparatus; Water purification units,” in International Class 11.¹

1047406 Ontario Ltd. (“Ontario Ltd.”) and Purifics ES, Inc. (“Purifics ES”) (collectively “opposers”) opposed registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, as used in connection with applicant’s goods, so resembles opposers’ previously used and registered mark PURIFICS as to be likely to cause confusion, mistake or deception. Opposers allege that since December 1993, they have provided “environmental remediation products and services in the fields of soil, waste, and water treatment and air purification,” including “waste water purification units, water purification and filtration apparatus, and water purification units.”² Ontario Ltd. has pleaded ownership of U.S. Registration 2062935 for the mark PURIFICS in standard character form for “environmental remediation services, namely, soil, waste and water treatment services and air purification services,” in International Class 40.³ Applicant denied the salient allegations of the notice of opposition.

The parties have filed briefs on the case. Opposers’ reply brief was stricken as untimely by Board order of August 28, 2014. An oral hearing was held on March 5, 2014.

¹ Application Serial No. 77861438, filed October 30, 2009 under Trademark Act § 1(b), 15 U.S.C. § 1051(b).

² Notice of opposition, ¶¶ 1-2 (TTABVue # 1).

³ Reg. No. 2062935 issued on May 20, 1997; Section 15 affidavit filed and acknowledged; renewed.

I. The record

The record includes the pleadings and, by operation of Trademark Rule 2.122, 37 C.F.R. § 2.122, the application file for applicant's mark. The record also includes the following testimony and evidence.

A. Opposers' evidence.

Opposers made of record, with their notice of opposition, a current printout of information from the electronic database records of the Patent and Trademark Office showing the current status and title of pleaded Registration. No. 2062935.

Opposers also made of record the testimony and discovery depositions (with exhibits thereto) of the following witnesses:

Testimony deposition of opposers' president Brian Butters (TTABvue ## 35 and 37).

Discovery deposition of applicant's chief executive officer Mark Owen ("Owen I," TTABvue # 36).

B. Applicant's evidence.

Applicant made of record testimony depositions (with exhibits thereto) of the following witnesses:

Testimony deposition of applicant's chief executive officer Mark Owen ("Owen II," TTABvue ## 40-42).

Testimony deposition of Marla Beier, litigation assistant for applicant's counsel (TTABvue # 38).

Testimony deposition of Heidi Van Baalen, trademark paralegal for applicant's counsel (TTABvue # 39).

Applicant also submitted notices of reliance on the following:

Opposers' responses to applicant's first set of interrogatories and first and second sets of requests for admission (TTABVue # 33).

Printouts of information from the electronic database records of the Patent and Trademark Office relating to various third-party U.S. trademark registrations (TTABVue #34).

II. The parties.

A. Opposers.

Ontario Ltd. (or its predecessor in interest) commenced business in 1993. Purifics ES was formed in 2003 and is Ontario Ltd.'s wholly-owned subsidiary. Purifics ES is now the operating company that does business under the PURIFICS mark, and it does so under a license from Ontario Ltd. Although both companies are based in Canada, 85-90% of their business is with the United States market.⁴

B. Applicant.

Applicant is an Oregon corporation organized in 2007, initially doing business under its corporate name UVCleaning Systems. In 2009, applicant adopted the trade name Puralytics. Applicant is headquartered in Beaverton, Oregon, and markets its goods in 36 countries, including the United States.⁵ A substantial percentage of its goods are sold to customers abroad.⁶

III. Opposers' evidentiary objections.

A. Opposers object to the admission of applicant's Exhibit 127, consisting of printouts of various internet web pages showing purported third-party trademarks

⁴ See Butters 8:23-10:6; and opposers' response to request for admission No. 40.

⁵ Owen I 8:2-10:11; 75:24-76:8.

⁶ *Id.* 78:23-79:13.

that include the designation PUR-, on the ground that applicant did not provide the date on which such web pages were published or accessed. Applicant contends that, for this reason, the evidence does not meet the requirements for admission of internet materials as “publicly available evidence,” citing *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010).⁷ The objection is overruled. The requirements established by *Safer* relate to internet materials offered under a notice of reliance as self-authenticating documents within the meaning of 37 C.F.R. § 122(e). The materials at issue were not so offered; rather, they were entered into evidence under the testimony of Ms. Beier and Ms. Van Baalen, who explained how they accessed the materials on the internet, the dates on which they did so, and how they created the printouts of which Exhibit 127 is composed.⁸ Their testimony is sufficient to admit these materials for what they show on their face.

B. Opposers object to the same Exhibit 127 on the ground that the evidence contained therein is not relevant. Opposers argue that, in order for evidence regarding third-party marks to be relevant, applicant must demonstrate that the third-party marks were actually used and well promoted and have been recognized by consumers, citing *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). The objection is overruled. *Palm Bay* did not find such evidence excludable for lack of relevance; rather, it merely discussed the limited probative value of such evidence

⁷ Applicant’s brief at 2-3.

⁸ The Beier and Van Baalen depositions are devoted in their entirety to placing Exhibit 127 in evidence.

where the extent of use, promotion, and recognition of the third-party marks has not been shown. We agree with opposers that internet web pages, alone, do not demonstrate the extent to which a trademark has actually been used on a product or in connection with a service, if at all; however, such web pages, which are in fact available online to the general public, are relevant to show the existence of marks that include the PUR- formative and that these marks have been disseminated online in connection with the offering of products and services relating to water treatment.

C. Finally, opposers object to the entirety of the testimony of Ms. Beier and Van Baalen, on the ground that it is inadmissible hearsay. Opposers contend that Ms. Beier and Van Baalen undertook purely ministerial duties in collecting the webpages and have no knowledge on which to base any testimony as to “whether the goods associated with the third-party marks are sold; when the goods were first sold, if ever; whether any other trade channels or forms of advertising were used with the third-party goods; or whether consumers recognized the third-party marks or the extent of their recognition of the marks.”⁹ The objection is overruled. Ms. Beier and Van Baalen testified only as to the manner in which they collected the materials included in Exhibit 127. It is not hearsay and is sufficient for the purposes of putting Exhibit 127 into the record, for what it shows on its face. Note also that the Board does not ordinarily strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, such objections

⁹ Opposers’ brief at 4.

are considered by the Board in its evaluation of the probative value of the testimony at final hearing. *Krause v. Krause Publications Inc.*, 76 USPQ2d 1904, 1907 (TTAB 2005); *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1326 (TTAB 1992).

IV. Applicant's evidentiary objections.

A. Applicant objects on grounds of hearsay to Mr. Butters' testimony that an ex-employee named Owen Egan stated that, at a particular time, he thought that Purifics and Puralytics were the same company. See Butters I 44:23-45:3. Mr. Egan's statement was offered for the truth of the matter asserted (*i.e.*, to demonstrate that he was confused). Mr. Butters' account of the incident is far too vague to be within the state-of mind exception of the hearsay rule. Accordingly, we sustain the objection. *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 204 USPQ 697, 701 (CCPA 1980).

B. Under the rubric of an "evidentiary objection," applicant objects that "Opposers did not assert common law rights in their Notice of Opposition," and that they "have provided no evidence of any prior use or common law rights in the PURIFICS mark outside of their Registration."¹⁰ To the extent that applicant seeks to characterize opposers' common law rights as an unpleaded claim as to which we should decline to receive evidence and testimony, the objection is overruled; the notice of opposition repeatedly asserts prior use of opposers' mark on goods not

¹⁰ Applicant's brief at 21-22.

included in the pleaded registration. Otherwise, the “objection” merely goes to the sufficiency of opposers’ proof and provides no basis for exclusion of any evidence.

V. Standing.

Ontario Ltd. has properly made of record its pleaded Registration. No. 2062935; and the evidence demonstrates that Purifics ES makes use of the PURIFICS mark as a licensee of Ontario Ltd.¹¹ Opposers have thus shown that they are not mere intermeddlers and have established their standing to oppose registration of applicant’s mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). *See also Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 n.8 (TTAB 2009); *Chicago Bears Football Club Inc. v. 12TH Man/Tennessee LLC*, 83 USPQ2d 1073, 1075 (TTAB 2007) (licensees have standing to oppose).

VI. Priority.

In view of opposer Ontario Ltd.’s ownership of a valid and subsisting registration of its pleaded mark, priority is not at issue with respect to the mark and services identified in that registration. *King Candy, Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). To the extent that opposers assert prior use of their mark in connection with *goods*, such priority must be proven, because it is not established by the registration.

¹¹ Butters 8:23-10:6; opposers’ response to interrogatory No. 5.

For purposes of testing opposers' asserted priority with respect to goods, we look to the filing date of the opposed application, which is October 30, 2009. Under Section 7(c) of the Trademark Act, 15 U.S.C. § 1057(c), applicant is entitled to rely on the filing date of its application as its date of constructive use. *Larami Corp. v. Talk To Me Programs Inc.*, 36 USPQ2d 1840 (TTAB 1995); *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542 (TTAB 1991). Although applicant's witness stated that applicant first used its mark "in the beginning of 2009,"¹² the evidence does not clearly establish any date of use earlier than the filing date of the application. In any event, as discussed below, opposers have demonstrated use of their mark on goods prior to this time.

The evidence of opposers' early use of their mark is very scant, but we find it sufficient to show use of the mark in connection with goods earlier than 2009. A news article from June 1998 makes note of opposers' Photo-Cat water treatment systems and includes a photograph of equipment bearing the PURIFICS mark.¹³ An advertisement, bearing the PURIFICS mark, for opposers' booth at the Brownfields 2004 trade show makes reference to the Photo-Cat air/water treatment systems, with a photograph of the product.¹⁴ (If the mark is on the goods, it is not legible.) A certificate of NSF International, addressed to Purifics ES and dated June 6, 2008, relates to opposers' Photo-Cat product, stating, "NSF International Certifies that the products appearing on this Listing conform to the requirements of

¹² Owen I 13:25-14:18.

¹³ "New remediation technology uses titanium dioxide, light to destroy contaminants in water," *U.S. Water News*, June, 1998, p. 16. See Butters Exhibit 13.

¹⁴ Butters Exhibit 16.

NSF/ANSI Standard 61 – Drinking Water System Components – Health Effects.”¹⁵ Opposers’ witness testified that the certification “is a requirement in many states in the U.S. before you can sell your wares for drinking water application. ... It’s an important third-party validation that your product, in this case, our photocatalytic product, does not do any harm to the water. It doesn’t release any chemicals or other undesirable minerals or metals to the water.”¹⁶ The record contains no documentation or even testimony relating to early sales or shipments of goods bearing the PURIFICS mark. The testimony of opposers’ witness was vague and reticent with respect to details of early use of the mark on goods. Nonetheless, we find the evidence sufficient to demonstrate that prior to 2009, opposers associated the designation PURIFICS with their photocatalytic water purification system, at least as a trade name.

In sum, priority is not an issue with respect to the services recited in opposers’ pleaded registration vis-à-vis the goods listed in the application, and opposers have demonstrated priority with regard to their use of the PURIFICS mark on a water treatment unit.

VII. Likelihood of confusion.

Our determination of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

¹⁵ Butters Exhibit 12.

¹⁶ Butters 17:8-18:11.

A. The parties' goods and services.

We consider first the similarity or dissimilarity between applicant's goods and the services recited in opposers' registration. Applicant seeks registration of its mark for:

Waste water purification units; Water purification and filtration apparatus; Water purification units.

Opposers' pleaded registration covers the following services:

Environmental remediation services, namely, soil, waste and water treatment services and air purification services.

Opposers' recitation of services is broad. The phrase "water treatment services" clearly encompasses water purification services; and presumably the provision of water treatment services would likely entail the use of "Water... filtration apparatus" or "Water purification... apparatus," as identified in applicant's application. The question before us, however, is whether applicant's goods and opposers' services are related in such a way that they may be encountered by the same persons under circumstances that could, because of the similarity of the marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010). The commercial aspects of environmental remediation services and water purification equipment are not a matter of common knowledge. Accordingly, it is not a foregone conclusion that applicant's goods and opposers' services are commercially related merely because the goods might be used in rendering the services. Opposers have

presented little in the way of evidence or testimony to persuade us that customers would believe that a single company would offer both the services and the goods. Indeed, the testimony and evidence provide only a vague idea of the nature of opposers' services,¹⁷ and at times opposers' witness did not appear to appreciate the difference between providing remediation services and selling customized remediation equipment.¹⁸ Applicant contends that it sells water purification apparatus but does not provide environmental remediation services of any kind.¹⁹ Opposers, for their part, have demonstrated that they sell water purification *goods*, but their involvement in remediation *services* is established primarily by the statutory presumptions accorded their pleaded registration under 15 U.S.C. § 7(b). Lacking better evidence than this, we cannot conclude that there is a commercial relationship between applicant's goods and opposers' services such that customers would be likely to suffer source confusion.

We next compare opposers' goods with those identified in the application. Opposers have shown that they produce, among other goods, a water purification unit called Photo-Cat that is marked with the PURIFICS brand. Opposers' website describes the product as follows:

Photo-Cat purifies water of chemicals, biologicals and certain metals to very high standards of purity.

¹⁷ When asked to list the services that opposers offer, Mr. Butters listed design services, startup services, after-sales support, "control or software services for our products," energy services, engineering services, and certification services, none of which squarely match the services recited in opposers' registration. *See* Butters 19:2-20:6.

¹⁸ Butters 46:4-11, in which the witness characterized applicants as providing a service.

¹⁹ Owen I 54:3-6; Owen II 10:22-11:6; 13:12-16.

Photo-Cat systems will treat water with a wide range of organics and concentrations, suspended oil, turbidity, high levels of total dissolved solids, and metals. These systems are fully automated and DO NOT require chemical oxidants.

...
Photo-Cat is produced to meet the specifications of a variety of clients in remediation, industrial, nuclear, military, pharmaceutical, potable, metals removal, process and laboratory applications.

These specifications can include NSF certification, food grade construction, pressure vessel certification, leak proof designs, customer specific materials of construction, specific instrumentation, performance factors, durability, and wash-down capability.²⁰

Opposers' witness described the main markets for opposers' goods as "municipal, industrial, and remedial," and explained as follows:

Municipal water is drinking water and it's water reuse and it's wastewater treatment.

...
[Water reuse] means that you clean up the water, that it can be reused for drinking water or other residential uses.

...
[Wastewater treatment is] upgrading the sewage to a reuse standard.

...
Industrial market involves... cleaning up the water that's discharged from industry... cleaning up water going into industry.... reusing the water in industry.

...
[Industrial customers] are various departments of the U.S. government....[and] private entities.

...
[Remedial] involves cleaning up groundwater for surface water discharge, reinjection, discharge to wastewater treatment plants. ... [Groundwater for surface water discharge] means we clean up the contaminated

²⁰ Butters Exhibit 14 at 000126-7.

groundwater such that it's clean enough that it can be discharged back into the environment directly.

...
[Remedial customers are] Industry and municipalities.²¹

In our analysis, when we consider applicant's goods we look only to the goods as identified in the application (even though the record may show that applicant's goods are somewhat different in nature from those of opposers), because the application defines the scope of the registration that applicant seeks. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, __ F.3d __, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014), *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Doing so, we find the parties' goods to be legally identical, as it is clear that opposers' goods, as shown by the evidence, are encompassed within the scope of "Water purification and filtration apparatus; Water purification units." Accordingly, with respect to the parties' goods, we find that the *du Pont* factor of the similarity or dissimilarity of the goods favors a finding of likelihood of confusion.

B. Customers; channels of trade; conditions of sale.

Applicant has submitted evidence and testimony to demonstrate that its goods consist of two distinct products (and several variations thereof) that are offered to quite distinct customer classes. One product, called SolarBag, is a small container for water that, when exposed to the sun, will purify the water and render it potable. It is marketed to recreational users such as campers, fishers, and backpackers; it is marketed to non-governmental organizations such as UNICEF

²¹ Butters 64:24-67:7.

We note applicant's argument that customers for remediation services and water purification units are sophisticated and exercise great care in selecting such goods and services.²⁴ However, the evidence shows that customers for applicant's SolarBag product, which has been offered on Amazon.com for \$75.05,²⁵ include consumers such as campers and backpackers.²⁶ More importantly, while applicant's customers may in fact include highly sophisticated customers, we cannot base our decision on potential purchasers not specified in the identification of applicant's goods. *Stone Lion*, 110 USPQ2d at 1163. The care and sophistication of potential customers is a neutral factor in our analysis.

C. The marks at issue.

We next consider the similarity or dissimilarity of the marks PURIFICS and PURALYTICS in terms of appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports*, 73 USPQ2d 1689. We base our determination on a consideration of the marks in their entireties. *Id.*; *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981). However, an analysis of individual aspects of the marks is a permissible part of our determination. *Price Candy Company v. Gold Medal Candy Corporation*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature

²⁴ Applicant's brief at 33; Owen II 19:13-20:10; 29:24-30:6.

²⁵ Owen I, Exhibit 6.

²⁶ Owen I 31:13-24.

of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161.

Opposers emphasize that both marks at issue begin with the syllable PUR- and end with the syllable -ICS; and that customers are likely to be more strongly impressed by the initial component of a mark than the remainder of it.²⁷ Opposers also argue that “both marks suggest the idea of water purification goods and services”; and that both parties selected the syllable PUR- in order to convey this meaning.²⁸ Moreover, opposers claim that in selecting their mark, they “wanted a mark that suggested to consumers the idea that purification was accomplished using photocatalytic means,” and that in this regard the motives of both parties, in selecting their respective marks, were the same.²⁹

While we acknowledge the elements of similarity between the marks, we also note substantial differences. The middle components of the two marks, -IF- in the case of opposers and -ALYT- in the case of applicant, are different in all respects and have a substantial impact on the respective commercial impressions created by the marks. In opposers’ mark, the letters -IF- combine with the letters before and after them to powerfully suggest the word “purification,” inasmuch as the mark and the word share the seven sequential letters PURIFIC- in common. This combination of letters might also call to mind the common word “terrific” in the minds of customers. By contrast, in applicant’s mark the combination of PUR- with

²⁷ Opposers’ brief at 14-16.

²⁸ *Id.* at 16-17.

²⁹ *Id.* at 17; *see* Butters 10:21-11:11.

-ALYT- results in a seemingly arbitrary string of letters, not suggestive of any common word. Instead, -ALYT- combines with the letters following it, -ICS, to strongly suggest well known words such as “catalytic” and “analytic.” In this regard, it differs pointedly from opposers’ mark. Despite opposers’ contention that they too selected their mark in order to suggest the “photocatalytic” process that is a feature of the goods, it is unlikely that customers would derive such an impression from the letters -ICS alone or from opposers’ mark as a whole. Thus, while the impression of “catalytic” is present in applicant’s mark, it is absent from opposers’ mark.

In considering the common elements of the marks, we find that the element PUR- is only weakly distinctive with respect to goods and services that relate to a purification process. Where the common elements of conflicting marks are suggestive of the goods or services at issue, the likelihood of confusion is reduced. *See, e.g., Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989) (PECAN SANDIES and PECAN SHORTEES); *Magnaflux Corp. v. Sonoflux Corp.*, 231 F.2d 669, 109 USPQ 313 (CCPA 1956) (MAGNAFLUX and SONOFLUX); and *Land-O-Nod Co. v. Paulison*, 220 USPQ 61 (TTAB 1983) (CHIROPRACTIC and CHIRO-MATIC). In addition, the shared -ICS component of the two marks is an extremely common suffix that is found in many commonplace words of diverse meaning (*e.g.*, politics, mathematics, aerobics, economics). We find that this shared component of the two marks is not likely to suggest to customers that the goods and services of the parties emanate from a common source.

In sum, we find that the two marks at issue are different from each other with respect to the relevant considerations of appearance, sound, meaning or connotation, and overall commercial impression. This *du Pont* factor weighs against a finding of likelihood of confusion.

D. Absence of actual confusion.

We note applicant's argument that there has been no actual confusion involving the parties' marks, despite co-existence in the marketplace since 2009.³⁰ Indeed, the absence of confusion has been proven by admission.³¹ While evidence of actual confusion is highly probative, its absence is not, unless it is accompanied by evidence demonstrating that, in light of the parties' actual business activities, confusion, if likely, would have occurred. No such evidence is before us. Therefore, we find the lack of evidence of actual confusion to be a neutral factor in our analysis of likelihood of confusion.

E. Relative fame of the marks.

Opposers argue that their mark is more famous than applicant's mark; that opposers have generated more sales of their goods and services under the PURIFICS mark than has applicant under the PURALYTICS mark; that opposers have "outspent" applicant in terms of promotion of their goods; and that opposers' mark has been in the market much longer than applicant's mark.³² Opposers have

³⁰ Applicant's brief at 34-35.

³¹ Opposers' response to request for admission No. 1; opposers' response to interrogatory No. 3.

³² Opposers' brief at 17-18.

not made any substantial evidentiary showing of the fame, or even commercial strength, of their mark and, accordingly, this factor is neutral in our analysis.

VIII. Conclusion.

We have considered all of the evidence of record and all arguments of the parties relevant to the issues before us, including those not specifically discussed herein. Considering all of the *du Pont* factors, we find the dissimilarity of the marks to be dispositive of this case. While applicant's goods are legally identical to opposers', we find that applicant's mark is not likely to give rise to confusion, mistake or deception as to the source of applicant's goods. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive.")

Decision: The opposition is dismissed.